Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1975

No. 75-1472

MICHAEL EDWARD CHASE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

MICHAEL EDWARD CHASE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, MICHAEL EDWARD CHASE, respectfully prays that a WRIT OF CERTIORARI issue to review the denial of a Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 1, 1976.

OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit denying a Petition for Rehearing is attached in the Appendix hereto.

JURISDICTION

The Petitioner was convicted of the offense of Murder with Malice, such conviction being affirmed on January 16, 1974. *Chase v. State,* (Tex. Crim. App.), 508 S.W. 2d 605. Certiorari was denied by the United States Supreme Court on October 15, 1974. 419 U.S. 840, 95 S. Ct. 71, 42 L. Ed. 2d 68 (1974).

Petitioner's Writ of Habeas Corpus was denied by the United States District Court for the Northern District of Texas, Dallas Division, on July 1, 1975. Petitioner thereafter appealed the District Court's adverse ruling to the United States Court of Appeals for the Fifth Circuit. On February 2, 1976, the United States Court of Appeals for the Fifth Circuit, pursuant to Local Rule 21, summarily affirmed the District Court's ruling. The Petitioner's Petition for Rehearing was denied without written opinion on March 1, 1976. This Court's jurisdiction is envoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the denial by the Court of Appeals for the Fifth Circuit to grant an oral argument and address the important Fourth Amendment issues presented to it constitutes a denial of Due Process as guaranteed by the Fifth Amendment to the Constitution of the United States?

2. Whether reliance on Local Rule 21 by the United States Court of Appeals for the Fifth Circuit was an abuse of discretion being in conflict with and doing violence to said Local Rule 21?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner was convicted for the offense of murder, his penalty being assessed at life in the Texas Department of Corrections. Critical to the conviction in this case was the admission into evidence of an oral confession of the Petitioner, the admissibility of which turned upon a construction of Article 38.22, Section 1(e), Texas Code of Criminal Procedure, which requires that before an oral confession is admissible in Texas such statement or circumstances must be found to be true by evidence corroborating such statement through the finding of evidence to support the same. As of this time, *no* federal court, that is the United States District Court or the United States Court of Appeals or the Supreme Court of the United States of America, has met head on the issue of the obtaining of a search warrant for an apparent lawful purpose but in reality for the purpose of manufacturing evidence, an activity for which no warrant could have issued, all in violation of Petitioner's constitutional rights.

Through the oral statement, the police reportedly learned of the involvement of a certain plywood board, a certain rope, and a weapon used in the killing. Since oral confessions or statements made by a defendant are not admissible unless in writing in Texas, or unless corroborated under the provisions of Article 38.22, the law enforcement officers obtained a search warrant for the residence of the Petitioner for the expressed purpose of searching for the remainder of the rope. The rope described in the search warrant was three-quarters of an inch in diameter and fifteen to eighteen feet in length. In executing the search warrant, however, the officers took the plywood board in question to the house, penetrated the wall with matching screws, attached chains, and photographed the "fitting" for the purpose of gathering evidence against the Petitioner to admit such evidence in Court, which was done, to corroborate the Petitioner's oral confession. The rope designated in the warrant was not found at the residence. As reflected by the opinion of the Texas Court of Criminal Appeals, at Page 10, the Court ruled that the taking of the photographs did not constitute a search and seizure, ignoring the fact that the photographs themselves were the product of a search and exploration beyond the scope of the warrant.

On May 15, 1974, the Texas Court of Criminal Appeals denied, without written opinion, Petitioner's Motion for Rehearing. The Supreme Court of the United States denied certiorari on direct appeal. 419 U.S. 840 (1974). Thereafter, the United States District Court for the Northern District of Texas, Dallas Division, denied Petitioner's Writ of Habeas Corpus based upon the Findings, Conclusions and Recommendations of the United States Magistrate to the effect that, *inter alia,* the subject matter of the photographs were in plain view and that, in any event, their admission into evidence was harmless error. Subsequent thereto, the United States Court of Appeals for the Fifth Circuit, pursuant to Local Rule 21, summarily affirmed the District Court's denial of the Writ of Habeas Corpus. A Petition for Rehearing to the United States Court of Appeals for the Fifth Circuit was denied without written opinion on March 1, 1976.

REASONS FOR GRANTING THE WRIT

1. The Denial by the Court of Appeals for the Fifth Circuit to grant an oral argument and address the important Fourth Amendment issues presented to it constitutes a denial of Due Process as guaranteed by the Fifth Amendment to the Constitution of the United States; said denial having serious detrimental implications upon the future of the administration of justice in the United States.

The Petitioner asserts that he has been denied, by the federal courts, due process of law as guaranteed by the Fifth Amendment to the Constitution. The Petitioner, after the highest State court had affirmed the verdict of guilty in the trial court, sought habeas corpus (28 U.S.C. § 2241) relief in the United States District Court for the Northern District of Texas, Dallas Division. From an adverse finding therein, Petitioner sought review via 28 U.S.C. § 2253 to the United States Court of Appeals for the Fifth Circuit. This review, by statute, was a matter of right. This is consistent with the case law on point. See *Coppendge v. United States,* 369 U.S. 438 (1962); *Arrastia v. United States,* 455 F. 2d 736 (5th Cir. 1972). It is accordingly a right fundamental to the concept of due process of law. *Arrastia v. United States, supra; Brewen v. United States,* 375 F. 2d 285 (5th Cir. 1967).

As stated in *Chapman v. United States,* 469 F. 2d 634 (5th Cir. 1972) at page 636, "abridgement of this right is incompatible with the most basic concept of due process."

In the present case, wherein substantial questions as to the guarantee of the Fourth Amendment rights exist, the Court of Appeals has, in substance, deprived the Petitioner of his day in court through the exercise and utilization of Local Rule 21, 28 U.S.C., Rules for the United States Court of Appeals for the Fifth Circuit. This result inescapably occurs because the right to be heard involves a *meaningful* right to be heard. It cannot be said that the reliance upon Rule 21 involved a meaningful right to be heard when a deprivation of rights of such a substantial and indeed unique nature occurs. While the congestion in the federal courts is well known, recourse to Local Rule 21 must never be had to avoid troublesome points. *N.L.R.B. v. Amalgamated Clothing Workers of America,* 430 F. 2d 966 (5th Cir. 1970). This result, unfortunately, has deprived the Petitioner of any semblance of his right to be heard, which is the essence of due process.

Petitioner contends that reliance upon Rule 21 without guidelines promulgated by this Honorable Court renders inadequate the right of appeal authorized by 28 U.S.C. § 2253, and has serious detrimental implications upon the administration of justice.

Statistics demonstrate that in an increasing percentage of cases oral argument is being denied. See SEGAL, "Oral Argument in the U.S. Court of Appeals: Can it be Salvaged?", in LITIGATION, Vol. 2, No. 1 (Fall 1975) at page 3. The congestion that has precipitated the need for screening is due to two factors according to Judge Bell of the Fifth Circuit: (1) "a caseload increasing in almost geometric progression . . .;" and (2) "the delays which inhere in the appeals system and the need to eliminate unnecessary delay." While no one would contend that screening of cases is undesirable per se, the lack of guidelines is particularly distressing in light of potential impacts upon public opinion and the ultimate goal of administering justice. The resolution of all cases on the docket is a desirable feature. But the elimination of a backlog of cases does not necessarily

equate with the full and effective administration of justice. There is, additionally, some question as to whether the drastic curtailment of oral arguments has contributed to the elimination of docket congestion. Segal, *supra* at 4, 49. Moreover, it is not plausible that *society* desires a rapid disposition of cases at even the slightest sacrifice of fairness in the administration of justice. As set forth by Justice Wright of the Court of Appeals for the District of Columbia in LITIGATION, Vol. 2, No. 1, (Fall 1975) at page 5:

> Authorities in this country fully recognize the importance of oral argument. In 1951 Mr. Justice Jackson wrote in the ABA *Journal:* "I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations." Mr. Justice Harlan in the *Cornell Law Quarterly* opined: "I should like to leave with you . . . the thought that your oral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves." A former judge of my own court has written: "The longer I sit on the bench the more convinced I become that a lawyer should never submit a case without oral argument." And the late Chief Justice Vanderbilt of New Jersey states the case more directly: "Cases that are not argued are not well decided."

This position among scholars and judges is further reflected by a report submitted to Congress in 1975 by the United States Commission on Revision of the Federal Court Appellate System which recommended the following [see LITIGATION, supra at page 6]:

> (1) In any appeal in a civil or criminal case, the appellant should be entitled as a matter of right to present oral argument, unless:
>
> (a) the appeal is frivolous;
>
> (b) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (c) the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument.

An additional argument stems from the wording of 28 U.S.C.,

Section 46(c), in reference to the assignment of Circuit Judges, which states in pertinent part:

> Cases and controversies *shall be heard* and determined by a court . . . [emphasis added].

Judge Wright points out that many lawyers and some judges believe that this terminology means that an *oral* argument is a prerequisite to a determination by the court. In any event, Judge Wright goes on to state:

> Whether or not, properly interpreted, the statute actually requires oral argument, I submit that the ends of justice, as well as its image, would be served by permitting oral argument *in all cases not utterly frivolous.* There is no question but that some lawyers are more effective orally than in a brief. By the same token, as the late Mr. Justice Harlan has advised us, "There are some judges who listen better than they read and who are more receptive to the spoken than the written word." [emphasis added].

Indeed, the interests of justice would be better served if the public image of the judiciary were preserved. The prevention of erosion of the public's respect for the judiciary is particularly important to the preservation of the traditional notions of fair play and justice in the post-Watergate era. This in turn will depend upon the continuing belief that everyone can have his day in court.

Furthermore, the potential for avoiding the determination of issues merely because they are difficult [and not for political, managerial or constitutional bases] is sound reason enough for this Honorable Court to formulate guidelines for the Courts of Appeals. An aggrieved litigant has a heavy burden in procuring review of decisions of the Court of Appeals. As such, that Court often provides the last forum in which a litigant can expect a decision on the points of law involved. As long as the Courts of Appeals can employ summary proceedings to avoid decisions on difficult and controversial points of law without guidelines laid down by this court, Due Process will remain, unfortunately, a constitutional non-guarantee.

2. The present case amply demonstrates the need for review of Court of Appeals summary procedures; the reliance

> by the Court of Appeals for the Fifth Circuit upon Rule 21 being in direct conflict with and doing violence to that rule.

It is the posture of the Petitioner that the Court of Appeals unmistakeably erred and abused its discretion by invoking Local Rule 21, U.S. Ct. of App. 5th Cir. Rule 21, 28 U.S.C., to affirm Case No. 75-3178, *Chase v. Estelle.*

Rule 21 states:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; *and* the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion. . . .

Initially, it should be noted that the court has relied upon *N.L.R.B. v. Amalgamated Clothing Workers of America, supra,* to justify their affirmance without opinion. Even a cursory reading of that case will reveal, however, how inapplicable it is to the present case.

N.L.R.B., supra, demonstrates application of the aforementioned four factors set forth by the Rule. Of additional significance is the statement of the court in *N.L.R.B., supra,* at 922:

> But of decisive significance in each of these factors [1 through 4 above], singly or collectively, is the further judicial determination by the court, "that an opinion would have no precedential value."

Instead of attempting to rebut the possible existence of each of the four factors above, a feat rendered desirable due to the absence of any indication by the Court of Appeals as to which of the four factors they determined to exist, Petitioner will demonstrate that an opinion would be of the highest precedential value due to the gross deviation from Fourth Amendment

standards which occurred herein, thereby rendering reliance upon Rule 21 totally misplaced and inexcusable.

The nature of the search, set forth above in the statement of the case, is diametrically opposed to Fourth Amendment standards as laid down by the Constitution and this Honorable Court. Thus, a written opinion would have established a new standard for search and seizures heretofore never envisaged by *our* founding fathers.

The case of *United States v. Rabinowitz,* 338 U.S. 5 at 6 stated that "Exploratory searches . . . cannot be undertaken by officers with or without a warrant." See also *Go-Bart v. U.S.,* 282 U.S. 344 (1931) and *Sandford v. Texas,* 379 U.S. 476 (1965). This proposition is dictated by the reasonableness requirement of the Fourth Amendment. Indeed, although a search may be reasonable at its inception, the ultimate scope and intensity of the search may violate the Fourth Amendment. In *Chimel v. California,* 395 U.S. 685 (1969) an otherwise legal search, albeit search incident to arrest, was invalidated as unreasonably beyond the area constitutionally justified.

In the present case, the constitutionally justified area was the entire house. The warrant, however, specified the item to be searched for. The acts of taking the board, screws, chain and photographic equipment with the specific intent to *manufacture* evidence to corroborate the oral confession clearly exceeds the authorized scope of the search. The case of *Coolidge v. Hampshire,* 403 U.S. 443 (1971) is instructive on the nature of the search. In *Coolidge, supra,* what began as a legal search extended outside the bounds of the authorized search. The "plain view" theory was advanced as a justification for the search and seizure of incriminating evidence. In holding that the "plain view" doctrine did not justify the search and seizure of evidence otherwise outside the authorized scope of the search, Mr. Justice Stewart emphasized that the fact that the officers knew the car to be there and planned to seize it justified a suppression of the evidence. In other words, the availability of obtaining a search warrant *specifying* the nature of the search and seizure, when coupled with the *inadvertent* nature of the search and seizure, would not uphold a search and seizure which exceeded an otherwise lawful search. In the present case, the

officers *knew* before they obtained the warrant to search for the rope that the *board* would be fitted into the wall. The fact that the officers proceeded to the house to be searched with the board, screws and photographic equipment creates an irrebuttable presumption that they intended to fit the board in place and take pictures in order to manufacture evidence so as to corroborate the oral confession of the Petitioner. This fact is more obvious when one considers the fact that the arrest of the Petitioner and his oral confession was on September 14, 1970. Yet the search warrant in the present case [the warrant was obtained for a *second* search of the residence in question] was not obtained and executed until October 7, 1970. The police were obviously confronted with evidentiary problems which necessitated the *manufacture of evidence.* Thus, they contemplated and used the warrant as a subterfuge to obtain access to the house.

Essentially, this Court is confronted with a situation where the police knew they were going to manufacture evidence. Had the police officers presented such a plan of action before a magistrate there is no doubt that a warrant could not have been lawfully issued to proceed on a course of such an intrusive nature. See Article 18.01 V.A.C.C.P. It should be pointed out that *Warden v. Hayden,* 387 U.S. 294 (1967) does not affect the validity of Article 18.01. Therefore, authorization for a search warrant with the avowed purpose of manufacturing evidence could not have lawfully been obtained. Hence, rather than reveal the scheme to the magistrate and lose the opportunity to manufacture such evidence, they proceeded to obtain a warrant to search for rope. Thereafter, the police would attempt to justify their intrusive conduct on the basis of the "plain view" doctrine.

Even a summary reading of the applicable law will reveal the objectionable nature of the "plain view" theory upon which the search was premised. As stated by Mr. Justice Stewart in *Stanley v. Georgia,* 394 U.S. 557 at 572:

> This record presents a bold violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and once inside, to launch forth upon unconfined searches and

> indiscriminate seizures as if armed with the unbridled power of a general warrant.

Certainly a written opinion on the deviation of the courts from accepted Fourth Amendment standards would have significant precedential value. Authorizing the police to engage in exploratory searches and ruses whenever they desire to avoid presenting probable cause to the magistrate for the exact purposes of the intended search and is a monumental departure from heretofore accepted standards and should be broadcast for the enlightenment of all. The failure of the Court of Appeals to hear oral arguments and write a reasoned opinion on this novel and unique point can only stem from the desire either not to establish such a precedent, or to avoid the troublesome issues herein presented. In the words of Mr. Justice Bradley in *Boyd v. United States,* 116 U.S. 616 at 635:

> illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * * * * It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Does an opinion based upon Local Rule 21 square with the Court's duty? Did the Court of Appeals fulfill their constitutional duty and respond to the issues involved? For that matter, can it be said that the Court's decision to rely upon Local Rule 21 is consistent with the rule set forth by Chief Justice Brown in *N.L.R.B., supra,* at page 972 where he states:

> The Court recognizes that it must – the word is must – never apply the Rule [referring to rule 21] to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues.

The Petitioner would respectfully assert that adherence to the above Rule has not occurred. In fact, there appears to be no manner whatsoever by which to justify reliance upon Rule 21.

One last aspect must be addressed to demonstrate the abuse of discretion on the behalf of the Court of Appeals. Article 38.22, Section 1(e) of the Texas Code of Criminal Procedure (V.A.C.C.P.) requires evidence corroborating the truth of state-

ments or circumstances contained in an oral confession before such oral confession is admissible. The Texas Court of Criminal Appeals, in *Chase v. State,* (Tex. Crim. App. 1974), 508 S.W. 2d 605 at 609, held that the pictures taken by the police officers were the evidence which corroborated Petitioner's oral confession, thereby justifying the admission of that confession. This application of facts to law was made by the highest court of the sovereign State of Texas.

It is a well established principle of law that a federal court cannot second-guess a state's application of its own law, *National Ed. Assn., v. Lee County Bd. of Public Instruction,* 467 F. 2d 447 (5th Cir. 1972). Principles of comity demand no less. See also *Gardner v. Louisiana,* 368 U.S. 207 (1961); *United States v. Phillips,* 477 F. 2d 973 (5th Cir. 1973), *cert. denied,* 414 U.S. 846; *Puckett v. Ellis,* 157 F. Supp. 923. Indeed, the determination of a Texas court as to whether particular apparatus was a gambling device within the meaning of a Texas statute was binding upon the federal court in *Williams Mfg. v. Prock,* 86 F. Supp. 447.

Unless this Honorable Court is willing to ignore well settled law, the admission of the oral confession cannot constitute harmless error as determined by the federal magistrate. This result is dictated because without the admission of the photographs, which permitted admission of the oral confession, no conviction could have resulted. There is every reason to believe that there exists a reasonable doubt if not a certainty that the complained of evidence indeed did contribute if it did not constitute the basis of the conviction. See *Fahy v. Connecticut,* 375 U.S. 85 (1963) and *Chapman v. California,* 386 U.S. 18 (1967). Indeed, without the photographs, the State had no case!

It therefore becomes apparent that reliance upon Local Rule 21 was completely without foundation. As such, the dilemma that litigants face and the denial of constitutional rights that can ensue from summary proceedings amply demonstrate the necessity for this Honorable Court to establish guidelines for the Court of Appeals.

SUMMARY AND PRAYER

In summary, Petitioner is the victim of police officers obtaining a search warrant under the guise of legitimacy when, at all times, an unlawful exploratory search was the objective of the execution of that warrant. The Texas Court of Criminal Appeals held that the evidence obtained by such exploratory search did not constitute a search and seizure, even though such was *the* evidence that corroborated Petitioner's oral confession. The Court of Criminal Appeals properly recognized that the photographs made after placing the board and screws in place were the necessary corroboration but the United States Magistrate concluded that such photographic evidence was, in effect, harmless error! As earlier stated no federal court has met head on the issue of the violation of the Petitioner's rights under the Fourth Amendment to be free from an unlawful search and seizure, thereby denying him his day in court up until the present.

For the above stated reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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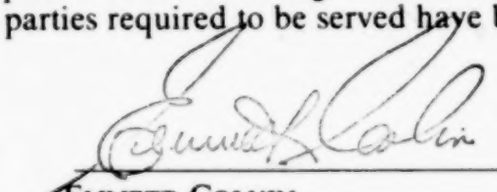
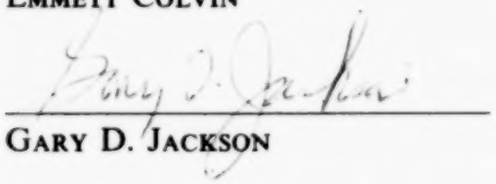
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this the 2 day of April, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Honorable John Hill, Attorney General for the State of Texas, Supreme Court Building, Austin, Texas. I further certify that all parties required to be served have been served.



EMMETT COLVIN



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APPENDIX A

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
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OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

March 1, 1976

TO ALL COUNSEL OF RECORD

No. 75-3178 - Michael Edward Chase v. W. J. Estelle, Jr.

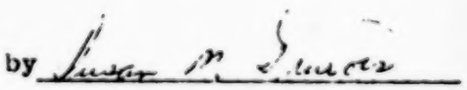
Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by 
Deputy Clerk

/smg

cc: Mr. Emmett Colvin
Mr. Bert W. Pluymen

APPENDIX B

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 75-3178
Summary Calendar*

MICHAEL EDWARD CHASE,

Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

(February 2, 1976)

BEFORE GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

1/See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX C

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

February 2, 1976

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

NO. 75-3178 - CHASE VS. ESTELLE

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure govern costs, petitions for rehearing and mandates, respectively. Local Rule 15 has been amended to provide: "A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to the recent amendment to Local Rule 7 which now provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH, CLERK

By Ann Richard Barré
Deputy Clerk

enc.

cc: Mr. Emmett Colvin
Mr. Gary D. Jackson
Mr. Bert W. Pluymen
Mr. John L. Hill

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY 29 1975
JOSEPH McELROY, JR., CLERK
BY _____ Deputy

MICHAEL EDWARD CHASE	)	
	)	
VS.	)	CIVIL ACTION NO. CA-3-74-1029-F
	)	
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	)	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Michael Edward Chase, hereinafter called applicant, is in custody of the Texas Department of Corrections pursuant to a sentence of life imprisonment imposed against him in the Criminal District Court No. 3 of Dallas County, Texas, in Cause C-70-6936-MJ, following conviction for the offense of murder with malice. The conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals. Chase v. State, 508 S.W.2d 605. The complaints raised in the present application were presented to the Court of Criminal Appeals in the direct appeal and applicant has, therefore, exhausted his state remedies. Applicant advances the following complaints:

1. Applicant complains of the introduction into evidence of an oral confession. The confession was given following applicant's arrest and following the proper "Miranda" warnings. The introduction of the statement into evidence is not, therefore, subject to an objection based on any law or provision of the Constitution of the United States. Applicant's complaint is that the Court erred in holding the confession admissible under the provisions of Art. 38.22, Sec. 1(e) of the Texas Code of Criminal Procedure. That statute provides, in substance, that an oral confession will be admissible only if the facts or circumstances stated by the defendant are found to be true and conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. In construing this statute, the Court of Criminal Appeals has specifically held that a confession may be admissible if it discloses inculpatory facts which conduce to establish guilt, although it neither leads to the recovery of stolen property or the instrument with which the offense was committed. Valtiero v.

State, 219 S.W.2d 73. That court has held that when the statement of the accused has led to the discovery of items or information (emphasis supplied) not theretofore discovered by the State, the "found to be true" requirement of Art. 38.22, Section 1, V.A.C.C.P., has been satisfied. Wilson v. State, 473 S.W.2d 532; Ashley v. State, 362 S.W.2d 847; Stelman v. State, 58 S.W.2d 831. In his statement, applicant gave a rather lengthy detail of events occurring prior to commission of the crime and subsequent occurrences, including the manner in which the body of the deceased was placed in the river and his efforts to conceal the crime. He told the officers that the murder weapon was a bayonet, that a rope was taken from the carport at his home for use in binding the deceased, that the sleeping bag in which the body was found belonged to a friend, and that a plywood board found with the body was a table top that came from his younger brother's room. All of these statements are inculpatory and further investigation corroborated their truthfulness. It is the action of the police in corroborating the statement relating to the plywood board about which applicant primarily complains, and which I will discuss in following paragraph number 2. However, if one disregards that evidence, I believe the finding of the trial court and the Court of Criminal Appeals that the oral statement was admissible is fully supported by the record in the case. I further believe, as respondent contends, that the ruling on the admissibility of the confession raises only a question of state law, and that in any event it was not so fundamentally unfair as to violate due process. Spencer v. Texas, 385 U.S. 554; Gephart v. Beto, 441 F.2d 319; Heads v. Beto, 468 F.2d 240.

2. On or about October 1st, the state authorities procured a search warrant to search the home of applicant's parents where applicant resided for a piece of rope approximately 3/4 inch in diameter and 15 to 18 feet in length, which applicant had stated was used by him in connection with the murder of Reuel Hanks. I do not believe that applicant contends that the affidavit supporting the warrant is subject to any objection based on the 4th Amendment to the Constitution of the United States. During the search, the officers came into the room occupied by applicant's younger brother and observed there some chains hanging from the wall or ceiling, as had been described by applicant in his statement and observed some screw holes into which the fittings on the plywood board might fit, as described by applicant. Having the plywood board with them, the officers fitted

the board to the wall and determined that the screws and fittings did, in fact, fit as applicant had described, and took pictures of the scene. The pictures were later introduced into evidence. Applicant complains that the actions of the officers in fitting the screws into the wall exceeded their authority under the search warrant. The Court of Criminal Appeals held that since the officers were lawfully in the room and the subject matter of the photographs were in plain view that the photographs were admissible. I believe this ruling is correct. Since the officers were lawfully in the room and could observe the screw holes and other circumstances disclosed by applicant, I find no authority which would support a contention that their actions in fitting the board to the wall and taking pictures thereof would constitute an unauthorized search and thus render the photographs inadmissible. I am of the further opinion that even if the pictures should be held inadmissible that the error in allowing their admission would be harmless error beyond a reasonable doubt. When taken with applicant's confession, the corroborating evidence pointing to his guilt as detailed by respondent on pages 7 and 8 of his answer is very compelling. I, therefore, believe the Court might find that there is no reasonable possibility that the photographic evidence contributed to applicant's conviction. Chapman v. California, 386 U.S. 18, 23; Vaccaro v. U. S., 461 F.2d 626, C.A. 5, April 12, 1972.

RECOMMENDATION:

For the reasons stated hereinabove, I recommend that all relief sought by applicant be denied.

UNITED STATES MAGISTRATE

U. S. DISTRICT COURT
NORTH[illegible] DISTRICT OF TEXAS
FILED
JUL 1 1975
JOSEPH McELROY, JR., CLERK
BY Marcelle Tonville
Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

MICHAEL EDWARD CHASE)
)
VS.) CIVIL ACTION NO. CA-3-74-1029-F
)
W. J. ESTELLE, JR., DIRECTOR,)
TEXAS DEPARTMENT OF CORRECTIONS)

O R D E R

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate, I am of the opinion that the findings and conclusions of the Magistrate are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that all relief sought by applicant is denied.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this order, together with a true copy of the Findings, Conclusions and Recommendation of the United States Magistrate, to applicant and his attorney of record, and to the Honorable John L. Hill, Attorney General of the State of Texas.

SIGNED AND ENTERED this 1st day of July, 1975.

UNITED STATES DISTRICT JUDGE

MICHAEL EDWARD CHASE, Appellant

No. 46,796 v. --- Appeal from Dallas County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appeal is taken from a conviction for murder. Penalty was assessed by the jury at life.

While the sufficiency of the evidence is not challenged, a brief recitation of the events which give rise to appellant's grounds of error is deemed necessary in order that appellant's contentions may be discussed with greater clarity.

Appellant, a seventeen-year-old high school student, lived with his parents in Dallas.

The appellant and the deceased, a schoolmate, attended a party on the night of August 21, 1970. The deceased was to spend the night with appellant and they left the party together. Appellant's parents were away from home for the night.

On August 24, 1970, the body of the deceased was found on the bank of the Trinity River. The body was encased in a green sleeping bag. A large rope was bound around the body.

Appellant gave officers a written statement on September 4, 1970, that deceased had been at his home on the night of August 21, 1970.

On September 10, 1970, at a time when the State contends that its investigation had not focused on appellant, a search was made of appellant's home without a warrant.

On September 14, 1970, an arrest warrant issued and appellant was taken into custody. A short time after his arrest, appellant made an oral confession to officers.

On October 7, 1970, a search warrant was obtained and appellant's home was searched for the second time.

At the outset appellant contends that the trial court lacked jurisdiction over the appellant in that Article 2338-1, V.A.C.S.,

denied the appellant the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States in establishing a different age requirement for conferring juvenile jurisdiction for males than females.

Appellant, a seventeen-year-old male at the time of the alleged offense on August 22, 1970, urges that had he been a female rather than a male, the applicable law[1] at the time in question would have required that the case pending against him be transferred to the juvenile court.

This court's decision in Ex Parte Matthews, 488 S.W.2d 434, is dispositive of appellant's contention. While Ex parte Matthews, supra, held that the disparity in the age classification between males and females was unconstitutional, this court went on to hold that every person was amenable to punishment under the Penal Code (Article 29, V.A.P.C.) except persons under the age of fifteen (Article 30, Section 1, V.A.P.C.) after excising the seventeen-eighteen year old classification from Article 2338-1, V.A.C.S., and Article 30, V.A.P.C. Thus, the court had jurisdiction of appellant in the instant case. See Hill v. State, ___ S.W.2d ___ (No. 46,760, 1-9-74).

Appellant contends that the court erred in admitting an oral confession in that such confession did not comply with the requirements of Article 38.22, Section 1(e), V.A.C.C.P.

Appellant urges that while his oral confession may have been explanatory it did not lead to any of the instrumentalities of the crime and is therefore inadmissible.

1/ Prior to November 1, 1972, Article 2338-1, Section 3, V.A.C.S., established the age requirements that placed a person within the jurisdiction of the juvenile court by defining "child" to mean any female person over the age of ten years and under the age of eighteen years and any male person over the age of ten years and under the age of seventeen years.

Effective November 1, 1972, Article 2338-1, Section 3, V.A.C.S., was amended defining the word "child" to mean any person over the ages of ten years and under the age of seventeen years.

The pertinent portion of Article 38.22, V.A.C.C.P., provides:

> "1. The oral or written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible if:
>
> " . . .
>
> "(e) It be made orally and the defendant makes a statement of facts and circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed."

Pursuant to an arrest warrant, appellant was taken into custody on September 14, 1970. After being arrested at the school he was attending, officers read appellant the "Miranda" warnings and, according to the officers, appellant stated he understood them. After entering the squad car, appellant made an oral confession in which he stated that a bayonet was the murder weapon; that a rope was taken from the carport at appellant's home which was used to bind the deceased; that the plywood board found with the body was a table top that came from his younger brother's room and that the sleeping bag the body was found in belonged to a friend.

After arrival at the sheriff's office, appellant was taken before a justice of the peace and from there to an interview room where the oral confession continued. Appellant stated that he and the deceased went to appellant's home after a party. According to Officer Williamson, appellant related that he and the deceased had an argument, but appellant would not talk about the incident surrounding the death of the deceased. Appellant stated that when he awakened the next morning, he found the deceased lying on the floor; that appellant went to the carport and got a sleeping bag and the rope and after placing the deceased in the sleeping bag he dragged the body to a tin shed behind the house.

Later, appellant returned to the shed, placed the deceased in the bed of a pickup, covered the body with a piece of plyboard and

drove to the river. Upon arrival at the river, appellant placed the deceased on the plyboard and dragged deceased to the water. After deceased was placed in the water, appellant put the plyboard over him.

Appellant argues that the officers already had all of the instrumentalities of the crime in their possession and nothing was recovered as a result of the oral confession. The sleeping bag and the plyboard were found with the body. A piece of rope and the bayonet were recovered in the officers' search of appellant's home on September 10, 1970.

In Ashley v. State, 362 S.W.2d 847, cert. denied 372 U.S. 956, defendant contended that no proper predicate had been laid authorizing the admission of an oral statement because the officers already had the deceased's automobile in their possession. After defendant's arrest, defendant's purse was emptied on a desk and defendant stated that keys emptied therefrom belonged to deceased's automobile. The keys were subsequently determined to fit deceased's automobile. This court found that such evidence was sufficient to show that the automobile had been under the control and in the possession of the defendant. The court went on to hold that the oral statement made at the time defendant identified the keys as belonging to deceased's vehicle was, under the facts and circumstances of the case, authorized to be admitted into evidence.

In Valtiero v. State, 219 S.W.2d 73, where a hat belonging to the victim was discovered by following the defendant's directions, this court said:

> "The facts here present demonstrate that facts and circumstances may be stated by an accused which unquestionably are inculpatory and conduce to establish his guilt, and yet neither lead to the recovery of stolen property, or the instrument with which the offense was committed."

The facts found to be true must be incriminating. Shelton v. State, 328 S.W.2d 445. When the facts or circumstances asserted have

not led to the discovery of items or information previously unknown to the State, confessions have been held inadmissible. Taggart v. State, 191 S.W.2d 728; Willoughby v. State, 219 S.W. 468; Baggett v. State, 144 S.W. 1136. When, however, the statement of the accused has led to the discovery of items or information not theretofore discovered by the State, the "found to be true" requirement of Article 38.22, Section 1, V.A.C.C.P., has been satisfied. Wilson v. State, 473 S.W.2d 532 (recovery of stolen vehicle); Ashley v. State, supra (identification of keys in defendant's possession); Stelman v. State, 58 S.W.2d 831 (location of victim and victim's wound); Sweat v. State, 29 S.W.2d 756 (location of burglary and identification of stolen property); Williams v. State, 27 S.W.2d 233 (location of murder).

The foregoing authorities dictate that Article 38.22, Section 1(e), V.A.C.C.P., requires that some evidence be found as a result of the defendant's statement which bolsters the reliability of the facts and circumstances in the statement that conduce to establish guilt.

In appellant's oral statement to the officers the plyboard which was found with deceased's body was described by appellant as having come from his brother's room; that it was a table top and the hinges on the board supported it against the wall; and the metal eye hooks on the board were hooked to chains. When the officers went to appellant's home on October 7, the plyboard was taken to appellant's brother's room. The plyboard was found to fit up to the wall with chains fastened thereto just as appellant had described in his oral confession. Photographs were taken of the plyboard attached to the wall and introduced into evidence.

The information obtained from appellant and confirmed by the officers taking the plyboard to appellant's home is like the identification and determination of the origin of the keys in Ashley v. State, supra. The origin of the plyboard was unknown to the officers prior to appellant's statement and the determination of the

truth of such statement conduced to establish appellant's guilt. Under these facts and circumstances, the appellant's oral statement was authorized to be admitted into evidence.

Appellant next contends that his oral confession was inadmissible in that there was no showing that the arrest warrant was based on probable cause.

The record reflects that the court granted appellant's motion to discover the warrant of arrest for appellant and the affidavit in support thereof.

The sole thrust of appellant's argument is that the State failed to establish, after due objection, that the arrest warrant was based on probable cause and therefore the oral confession should have been suppressed.

In support of his contention, appellant points to the testimony of Officer Williamson:

> "Q. . . . I will ask you if you were present when Mr. Oxford of the Dallas Sheriff's office swore out an affidavit charging Michael Edward Chase with the murder of Reuel Dean Hanks?
>
> "A. I was.
>
> "Q. All right. I will ask you as a result of the affidavit that was filed in support of his accusation if an arrest warrant was issued.
>
> "A. It was."

Appellant calls our attention to another place in the record where the same information was elicited from Williamson and due to the fact that the testimony does not vary in any material respect it will not be repeated.

The trial court, in its findings of fact and conclusions of law in overruling appellant's motion to suppress the oral confession, found (among other findings) ". . . there is no evidence to show that the affidavit upon which the arrest warrant is founded contains warrants sufficient to qualify as probable cause to issue the said warrant. The court further finds that the detention of the defendant,

Michael Edward Chase, was in fact lawful despite the defective arrest occurring at its inception."

In Lacefield v. State, 412 S.W.2d 906,[2/] it was held that a confession otherwise shown to have been voluntary is not rendered inadmissible by the fact that the accused was under arrest or in custody at the time, even though the arrest may have been under invalid process or without any process or legal right. See De Leon v. State, 466 S.W.2d 573; Randolph v. State, 493 S.W.2d 869. Appellant does not claim nor does the record reflect that the statement was not voluntary. It is not disputed that appellant was properly warned before making the oral statement. The evidence supports the court's finding that there was ample reason to detain appellant and that his detention did not vitiate the confession. The record does not demonstrate, nor is it contended that appellant was held incommunicado for an extended period of time, denied food or drink or critically deprived of his capacity for self-determination. Coercion has not been urged or established.

We hold that the trial court's findings that the oral confession was admissible are supported by the evidence.

Appellant next contends that evidence was seized on October 1 at appellant's home pursuant to search warrant which was based upon an affidavit which failed to show probable cause.

The search warrant and affidavit are in the record and are, therefore, properly before the court for review. The affiant, Officer

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2/ In Lacefield v. State, supra, this court, speaking through now Presiding Judge Onion, pointed out that state and federal courts have had occasion to pass on the contention that a confession following an illegal arrest is ipso facto inadmissible under Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, and that such contention has been generally rejected. See numerous federal and state cases cited in Lacefield v. State, supra.

Oxford, recites in the affidavit that he was in appellant's home on September 10, 1970, in connection with the investigation of the death of the deceased and while there observed a hemp rope approximately 3/4 inch in diameter and 15 to 18 feet in length. The affidavit further sets out the warning given appellant before he made an oral statement on September 14, 1970, in the presence of affiant and then states: "He [appellant] then stated that the above rope was used by him in connection with the murder of Reuel Hanks." Affiant concludes, "I do believe the above described rope is an instrumentality of the crime of murder and is presently located at the above described premises."

Appellant urges that the affidavit and warrant call for a search of "mere evidence" and that such a search is not authorized under Article 18.01, V.A.C.C.P.[3/], the pertinent portion of which reads:

> "A 'search warrant' is a written order issued by a magistrate, and directed to a peace officer, commanding him to search for personal property and to seize the same and bring it before such magistrate; or it is a like written order, commanding a peace officer to search a suspected place where it is alleged stolen property is commonly concealed, or implements kept for the purpose of being used in the commission of any designated offense."

Appellant argues that since the crime in question had already been committed the rope from which a piece was used to dispose of the body of the deceased was not an implement "kept for the purpose of being used in the commission of any designated offense."

Under the narrow construction of Article 18.01, V.A.C.C.P., urged by appellant, officers would be precluded from obtaining a search warrant for a bottle of poison from which a fatal dose was administered. Such a strict construction of Article 18.01 is not in harmony with Article 1.26, V.A.C.C.P., providing:

3/ Article 18.01, V.A.C.C.P., "Search Warrant," and Article 18.02, V.A.C.C.P., "Grounds for Issuance," were amended by the 63rd Legislature, effective January 1, 1974.

> "The provisions of this Code shall be liberally construed, so as to obtain the objects intended by the Legislature: The prevention, suppression and punishment of crime."

Further, precedent does not require such an unnecessarily strict construction as urged by appellant.

In Cagle v. State, 180 S.W.2d 928, where a search warrant issued for implements used in aiding in commission of offense of keeping a policy game, this court held that a book containing social security numbers of employees of defendant seized in the search should have been excluded, saying:

> "We are at a complete loss to discover how it would be possible for a book containing social security numbers of purported employees to be used in conducting a policy game, or to be classed as an implement for such purpose."

This court in Cagle went on to say:

> " . . . if property was seized which was not used or usable in committing the offense, but was only of evidential value in establishing accused's guilt of the crime charged, such evidence should, upon objection, thereto have been excluded." (Emphasis supplied.)

The distinction between Cagle v. State, supra, and the instant case is apparent.

While records of social security numbers of defendant's employees could not be used in committing the offense of conducting a policy game, the rope from which a piece was taken to bind the deceased's body was property "used or usable in committing the offense" of murder.

We reject appellant's contention that the addidavit did not furnish probable cause for issuance of the search warrant.

IV Appellant contends that the officers went beyond the scope of the search warrant in placing a plyboard (found near deceased's body) against a wall in appellant's home, matching the screw holes in the board with those on the wall, attaching chains on the wall to the board and photographing the "fitting." Pictures of the board positioned against the wall were introduced into evidence. Appellant

urges that obtaining the search warrant for the rope was a "ruse" for the officers to accomplish the "fitting" of the board to the wall.

Having heretofore determined that the search warrant was valid, the officers were legally upon the premises and the warrant did not restrict the portion of appellant's home they were to search.

In Tocher v. State, ___ S.W.2d ___ (No. 46,568, November 28, 1973), it was contended that photographs taken at the scene where a murder occurred "were not within the scope of the search warrant issued by the Justice of the Peace, since they were not 'weapons and implements' of the crime as stated in the search warrant."

As in Tocher, the officers were on the premises pursuant to a search warrant, the pictures taken reflect nothing more than the officers were able to observe at the scene, and there is nothing to indicate that the wall depicted was in any way obscured from the view of the officers as they conducted a search through appellant's home.[1]

We conclude that the taking of the complained of pictures did not constitute a search and seizure within the meaning of the Fourth Amendment. See Tocher v. State, supra, and cases cited therein.

In his last contention appellant contends that the court erred in admitting evidence seized at appellant's home on September 10, 1970, in violation of appellant's Fourth and Fourteenth Amendment rights.

The record reflects that officers went to appellant's home on September 10, 1970. According to the officers, appellant was not a suspect at this time. Upon arrival at appellant's home, the officers told appellant's parents that they had come to a

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[1] The record reflects that the officers were unable to find the rope which was the subject of the search warrant.

"dead-end" in the investigation of the deceased's death and that they wanted to see the rooms that appellant had earlier described in an affidavit given them. Officer Williamson testified that appellant's parents were very cooperative and appellant's father said "we could do anything we wanted to in the house." The officers advised appellant's parents that they would like to bring Officer Kitchen from the Crime Scene and Search Section to the house and appellant's father responded, "You can bring anyone you want to out. Y can do anything you feel is necessary for the investigation." Appellant was present a portion of the time and, according to Williamson, appellant showed them through the house.

The thrust of appellant s contention is that the State has not sustained its burden of showing that a valid waiver of a constitutional right was given. In support of this contention appellant points to the fact that appellant's parents were not informed of their right to refuse the search and urges that a person must be informed that consent can be withheld before there can be a valid consent.

In Schneckloth v. Bustamonte, ___ U.S. ___, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), as in the instant case, the party alleged to have given the consent was not advised that he had a right to refuse to consent. The United States Supreme Court said:

> "Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." See Lowery v. State, 499 S.W.2d 160; Cole v. State, 484 S.W.2d 779; De Voyle v. State, 471 S.W.2d 77.

The instant case is unlike Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); Lowery v. State, 499 S.W.2d 160; Paprskar v. State, 484 S.W.2d 731, where coercive factors were present in obtaining consent to search.

After reviewing the circumstances surrounding the giving of the consent to search, we conclude that the trial court's findings in admitting the evidence found at appellant's home on September 10, 1970, are supported by the evidence.

Arguments advanced in appellant's pro se brief have been disposed of under contentions discussed in this opinion.

Finding no reversible error, the judgment is affirmed.

Davis, Commissioner

(Delivered January 16, 1974)

Opinion Approved by the Court